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No. 86-2044

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ,

Petitioner,

vs.

JOSEPH CAHILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Question Presented for Review

The New York State Public Service Commission regulates the rates a utility may charge for the services it provides customers. The State's utilities have traditionally made contributions to charities which benefit their respective service territories. The Commission, in setting a revenue requirement which will enable the utility to earn a fair rate of return, permits the utility to include in the expenses they submit as a basis for that revenue requirement a portion of the expense they incur in making these charitable contributions. Because the First Amendment to the United States Constitution does not shield against merely private conduct, the Commission's charitable contributions policy violates the First Amendment only if the Commission's approval of the utility's action in making the contributions and then seeking rate recovery of them constitutes state action. Against this background, the question presented is:

For the purposes of finding state action under the First and Fourteenth Amendments of the United States Constitution, may the act of a private utility in making contributions to charities be deemed that of the state merely because the Public Service Commission recognizes a portion of the charitable contributions expense when it makes rates, which the utility then collects from its customers?

Parties

The parties to the proceeding before the Court of Appeals of the State of New York are listed below.

Appellants, and intervenors supporting appellants, below were as follows:

Public Service Commission: Paul L. Gioia, Chairman; and Commissioners Edward P. Larkin, Carmel C. Marr, Harold A. Jerry, Jr., Anne F. Mead, Rosemary S. Pooler, and Gail Garfield Schwartz;

New York Telephone Company;

Central Hudson Gas and Electric Corporation.

Respondent below was as follows:

Joseph Cahill.

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Petitioner,

vs.

JOSEPH CAHILL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

The New York State Public Service Commission (hereinafter "PSC") petitions for a Writ of Certiorari to review a Judgment of the Court of Appeals of the State of New York entered on December 19, 1984. The PSC Motion for Reargument/Clarification was denied on March 24, 1987.

Opinions Below

The opinion of the Court of Appeals of the State of New York, attached to the Joint Appendix of petitioners New York Telephone Company and Central Hudson Gas and Electric Corporation ("Joint Appendix") at page A-1, is reported at 69 N.Y.2d 265, 506 N.E.2d 187, 513 N.Y.S.2d 656 (1986). The Order of the Court of Appeals denying the Motion for Rehearing/Clarification, 69 N.Y.2d 862, _____ N.E.2d _____, _____ N.Y.S.2d _____ (1987), is attached hereto as Appendix A. The opinion of the New York State Appellate Division, Third Department, attached to petitioners' Joint Appendix at page A-1, is reported at 113 A.D.2d 609, 498 N.Y.S.2d 499 (1986), and the opinion of the New York State, Albany County Supreme Court, attached to the petitioners' Joint Appendix at page A-30, is reported at 128 Misc.2d 510, 490 N.Y.S.2d 90 (1985). The PSC policy challenged here is set forth in *New York Telephone Company*, 84 P.U.R.3d 321, 349-350 (1970), attached to the petitioners' Joint Appendix at page A-45.

Jurisdiction

The Court of Appeals of the State of New York entered its decision on December 19, 1986. Petitioner sought Reargument/Clarification, and the Court of Appeals denied the Petition on March 24, 1987. This petition has been filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions, Statutes and Regulations

The full text of the relevant constitutional provisions are set forth in Appendix B.

Statement of the Case

The PSC is charged with regulating the rates New York's utilities may charge for the services they render customers. The PSC generally follows a set of time-tested procedures in making rates. Essentially, the utility submits proposed rates based upon two components; the expenses it will allegedly incur and a suggested rate of return on its investment. The PSC reviews the utility's application, and makes rates based upon the expenses found reasonable and the rate of return found proper. The utility may then charge only the rates the PSC has approved. The utility, however, may spend its revenues according to its best business judgment, so long as it provides safe and adequate service. It may spend more on an item than the amount the PSC used in formulating the rate, it may spend less, or it may spend nothing at all.

The PSC orders only that the utility levy the specific charges set in rates. The PSC does not order the utility to spend specific amounts on a specific item, except in unusual circumstances. The PSC here has done nothing more than apply these time-tested ratemaking techniques to the utility's charitable contributions expense.

New York's utilities have traditionally made contributions to charities associated with their respective service territories. Prior to 1970, these contributions were accounted for rate making purposes "below the line;" in other words, the PSC did not allow the utilities to include charitable contributions expenses in their revenue requirements because it did not consider such expenses normal utility business operating expenditures. As a result, the contributions were paid out of a utility's earnings, reducing the amount otherwise available for utility stockholders.

In 1970, the PSC reconsidered its position and decided that a limited amount of a utility's charitable contributions expense could constitute a legitimate business expense. Thus, the Commission said it would permit utilities to recover a restricted level of these expenses in rates. *New York Telephone Company*, 84 P.U.R.3d 321, 349-350 (1970). The PSC in that decision also decided that the contribution level appropriate for ratemaking purposes was a utility's pre-1970 level of contributions, adjusted for inflation.

The PSC, however, did not require *any* utility to spend *any* amount in support of *any* charitable organization. Its ruling simply provided that if a utility so desired, it could make charitable contributions to the donees of its choice and account for a reasonable portion of those expenses as an operating expense for ratemaking purposes. Indeed, since 1970, the Commission has never ordered a utility to make a charitable contribution to any donee; it has never established the amount of any specific contribution; and it has never ordered a utility to disconnect a customer for failure to pay the portion of his bill attributable to such contribution.

Since the enactment of the PSC's policy, New York's investor-owned utilities have adopted strikingly different postures towards charitable contributions. Some have limited their contributions to levels recognized for rate making purposes, while others have made donations substantially in excess of their respective benchmarks. And, as might be expected, the utilities' choice of charitable donees spans a broad range of social, cultural and educational interests.

Different utility philosophies in this area were anticipated because the PSC left the level of donation and the selection of specific donees to management

discretion. The policy statement declared that "it is not our function to screen lists of contributions to pick out the good from the bad." *New York Telephone Company, supra* at 350. As with any other expense recognized in making rates, the utilities are free to choose where they will spend their money (in selecting donees), and how much they will spend (in the amount of specific donations).

Nonetheless, the foundation of Mr. Cahill's state action theory is that the PSC's policy forces him, when paying his telephone bill to petitioner New York Telephone Company (hereinafter "New York Telephone"), to support charitable organizations in contravention of his rights to freedom of expression and free exercise of religion under the First Amendment to the United States Constitution. Mr. Cahill instituted a proceeding in State of New York, Albany County Supreme Court, alleging that the Commission, by *permitting* New York Telephone to reflect $2.1 million of charitable contributions expense in the operating expense component of its 1984 revenue requirement, forced him to support organizations repugnant to his religious beliefs, such as Planned Parenthood, and thereby violated his First Amendment rights.

At no point, did Mr. Cahill allege that the PSC's policy coerced or compelled New York Telephone either to make charitable contributions to organizations such as Planned Parenthood or to recover these gifts in rates (*i.e.*, base its revenue requirement in part on a charitable contributions operating expense component). Instead, his position was that the PSC was responsible for the donations, because "but for" its policy, New York Telephone would not have been able to charge ratepayers for its charitable contributions expense. This alleged responsibility constitutes the state action underlying Mr. Cahill's First Amendment claim.

The PSC moved to dismiss the petition on the ground, *inter alia*, that its rate making policy did not constitute "state action" because permitting (but not mandating) limited rate recovery of charitable contributions does not transform a utility's charitable donations into those of the State of New York. This motion was denied by a memorandum decision of the Albany County Supreme Court. *Cahill v. Public Service Commission*, 128 Misc.2d 510, 490 N.Y.S.2d 90 (1985). The court said that the PSC, through its ratemaking policy, controlled the amount and nature of acceptable contributions, creating the nexus between New York Telephone's action and that of the PSC necessary to meet the state action test established by this Court in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974).

An appeal was taken to the New York State Appellate Division, Third Department, which affirmed the lower court's order in a 3-2 decision, based upon the fact that the PSC policy permitted the cost of charitable contributions to be passed along to customers. In a well-reasoned dissent, however, the minority pointed out that nowhere in Mr. Cahill's allegations did he "attribute the claimed constitutional deprivation to the PSC other than indirectly through its purely regulatory authority over respondent New York Telephone Company." *Cahill v. Public Service Commission*, 113 A.D.2d 603, 607, 498 N.Y.S.2d 499, 502 (1986). The dissent further noted that any invasion of Mr. Cahill's rights resulted from the direct acts of New York Telephone in making charitable contributions and that a sufficient nexus did not exist between the state and the challenged action as required by *Jackson* and *Blum v. Yaretsky*, 457 U.S. 991 (1982). 113 A.D.2d at 607-09, 498 N.Y.S.2d at 502-03.

The PSC then appealed to the New York State Court of Appeals, which affirmed the Appellate Division by a vote of 5-2. *Cahill v. Public Service Commission*, 69 N.Y.2d 265, 506 N.E.2d 187, 513 N.Y.S.2d 656 (1986). The majority relied upon a nexus it discerned in the interaction between the utility's monopoly status and the PSC's rate setting function. 69 N.Y.2d at 270-72, 506 N.E.2d at 188-90, 513 N.Y.S.2d at 657-59. This view simply does not accord with prior precedents interpreting the state action doctrine, as the dissent points out.

As the dissenters saw it, what "is made absolutely clear by the case law. . .is that the State's mere acquiescence in the conduct of a regulated private entity does not transform an essentially private choice into a governmental action." 69 N.Y.2d at 277, 506 N.E.2d at 193, 513 N.Y.S.2d at 662. The dissent pierced the veil of Mr. Cahill's complaint, finding that although Mr. Cahill "insists that his quarrel is solely with the policy decision of the PSC, a governmental entity, it is apparent that the real source of his aggrievement is the acts of the private utility. . . ." 69 N.Y.2d at 275-76, 506 N.E.2d at 192, 513 N.Y.S.2d at 661. Because Mr. Cahill's claim amounted "tc nothing more than a contention that the State has refused to interfere with the utilities' decision to pass along their charitable contributions costs to their customers. . . .[t]here is no allegation that the PSC has compelled this activity, and, indeed, there could be none." 69 N.Y.2d at 278, 506 N.E.2d at 194, 513 N.Y.S.2d at 663. As the dissent found, the PSC's role in the rate setting process simply does not create state action.

The PSC petitioned for reargument/clarification of the Court of Appeals' decision. By order of March 24, 1987 the Court of Appeals denied the petition. *Cahill v. Public Service Commission*, 69 N.Y.2d 862, _____ N.E.2d _____, _____ N.Y.S.2d _____ (1987).

REASONS FOR GRANTING THE WRIT

A. The Decision of the New York State Court of Appeals Conflicts with this Court's Prior Decisions on the State Action Doctrine.

State action is an essential ingredient to a cause of action based on the First and Fourteenth Amendments to the U.S. Constitution because the latter provides "no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The state action doctrine is designed to distinguish between acts of the state, which the First Amendment circumscribes, and private acts, which the First Amendment does not reach. This distinction "is a fundamental fact of our political order." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). As this Court stated in *Lugar*:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. *Id.* at 936.

This Court has carefully delineated the tests that must be applied in drawing this distinction between state action and private conduct. A complaining party must demonstrate that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the state itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). This principle was further refined in *Blum v. Yaretsky*, 457 U.S. 991 (1982), where this Court stated that "the purpose of this requirement is to assure that constitutional standards are invoked only when it can be

said that the state is *responsible* for the specific conduct of which the plaintiff complains" (emphasis in original). *Id.* at 1004.

The state action doctrine therefore requires courts to determine whether the challenged activity here (New York Telephone's making of charitable contributions and accounting for a portion of this expense as operating expenses for ratemaking purposes) can be attributed to New York State. The PSC's approval, however, of utility rates, and its acquiescence to utility enforcement of those rates, does not transform the utility conduct into state action.

This Court has unequivocally held that private conduct is not state action unless ordered or compelled by a state regulatory authority. The *Jackson* and *Blum* cases establish that state action exists only where the state has compelled the challenged activity by ordering it. Mere acquiescence of the State to private conduct does not constitute state action.

In *Jackson*, this Court found that termination of electric service by a privately-owned utility did not constitute state action even though the utility was extensively regulated and the challenged termination was pursuant to a state-approved tariff. As the Court observed:

> Approval of a state utility Commission of. . .a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice *by ordering it*, does not transmute a practice initiated by the utility and approved by the Commission into "state action" (emphasis added). *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 357.

Since the Commission has never ordered any utility to include charitable contributions in its operating expenses, and has never ordered any utility to make charitable contributions, utility charitable gifts cannot be attributed to the State. The Commission merely orders utilities not to charge any rate other than that specified by the Commission. Collecting bills based upon that rate and spending of the resulting revenues are matters generally left to the utility's business judgment. Therefore, ratemaking approvals, such as that expressed in the PSC's charitable contributions policy, do not constitute state action.

Blum v. Yaretsky, supra, reinforces this conclusion. In *Blum,* this Court found that a program designed to "assure that [Medicaid] payments . . . are not in excess of reasonable charges, did not constitute state action." 457 U.S. at 994 n.3. Under this program, review boards ("URC's") consisting of private physicians periodically reassessed the health status of medicaid patients placed in long-term medicaid care facilities. If the URC determined that it was medically appropriate to transfer the patient to a lower level of care, the patient's benefits were reduced whether or not the transfer was accepted. *Id.* at 993-98.

There was no state action in *Blum* because there was an insufficient nexus between the URC cost control review and the decision to transfer the medicaid patients. To clarify the state action doctrine and to distinguish state action from private conduct, the *Blum* Court identified three situations where the requisite nexus between private conduct and state action might exist:

1. When state regulation is so extensive "that it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains" (emphasis in original.) *Id.* at 1004.

2. Where the state has exercised "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the state." *Id.*

3. Where the private entity has exercised powers "that are traditionally the exclusive perogative of the state." *Id.* at 1005.

This court then found that there was no state action under any of these criteria, for reasons that apply equally well to this case. First, the state's "adjusting benefits [did] not render it *responsible*" (emphasis in original) for the transfers. *Id.* at 1005. The transfer decision was made by private parties, physicians and nursing home administrators, in conformity with established medical practices. The state merely made economic adjustments in response to the private decisions. *Id.* at 1005-9. Of course, the result of the adjustment created an economic incentive for transferring the patient. Similarly, the Commission's rate treatment response to the utility's private decision, following established business practices, does not make the state responsible for such decisions, even if an economic incentive to make charitable contributions results.

Second, the court found that the private decisions to transfer medicaid patients could not be deemed that of the state, because mere "approval or acquiescence in the initiatives of the private party is not sufficient to justify holding the state responsible for those initiatives." *Id.* at 1004-5. Neither the state mandated review of benefit levels, nor imposition of penalties if benefits were improperly granted, nor the reduction of benefits upon transfer indicated that the state overtly or covertly coerced the private party into making a decision. *Id.* at 1009-10. Similarly, including an adjustment for

charitable contributions in rates does not constitute enforcement of the utility's decision to make such contributions. Under the *Blum* and *Jackson* definitions of state action, the state creation of economic incentives inherent in ratemaking offers an insufficient nexus for attributing private conduct to the state.

Third, despite extensive regulation, the nursing homes and physicians did not provide a service traditionally provided by the state. *Id.* at 1010-11. Likewise, utilities, despite extensive regulation, do not provide such a traditional state service.

The Court of Appeals' attempt to reconcile its decision with *Jackson* and *Blum* does not withstand close analysis. The court erroneously perceived a nexus between the PSC's rate setting authority and the utility's monopoly status, creating state action, because "the combined effect of the utility's monopoly status and the rate order is . . . coercive." *Cahill v. Public Service Commission*, 69 N.Y.2d at 273, 506 N.E.2d at 191, 513 N.Y.S.2d at 660. However, this Court in *Jackson* and *Blum* explained at great length that regulation alone, even if extensive, does not create state action. The *Jackson* court also delved into an extensive analysis of the utility's monopoly status, and found that such status did not create state action, even in conjunction with heavy state regulation. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351-52. Therefore, this court has already rejected the basis for the Court of Appeals' decision.

B. The Court of Appeals' Reliance on *Abood v. Detroit Board of Education* is Misplaced.

In finding state action, the lower court relied heavily on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), where this Court upheld the objections of teachers who challenged the use of compulsory union dues to finance political activities. Although state action was not discussed in *Abood*, the lower court herein reasoned that if there was state action and compulsory subsidization of ideology in that case, then the Public Service Commission's ratemaking policy must also involve state action. *Cahill v. Public Service Commission*, 69 N.Y.2d at 271, 506 N.E.2d at 189, 513 N.Y.S.2d at 658. *Abood*, however, concerned a school board's union shop agreement which *required* the school board (not the union) to *force* employees to pay union dues as a condition of employment. Here, the PSC is simply *permitting* utilities to recover charitable contributions in rates. There is no question that the relationship in *Abood* between the Detroit School Board, a governmental entity, and its non-union employees was much more direct than the nexus in this case between the PSC and Mr. Cahill.

In addition, it is clear that state action was essential to establish the *Abood* claim. See *Price v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 795 F.2d 1128 (2nd Cir. 1986), *cert. petition pending*, 55 U.S.L.W. 3593 (1987). In *Price*, a challenge was brought by certain union members against the use of their dues for political purposes, where the plaintiffs were required to belong to a union pursuant to collective bargaining agreement negotiated by their private employer under the National Labor Relations Act (NLRA). The court found that, while Section 8(a)(3) of

the NLRA (29 U.S.C. §158(a)(3)) permitted exclusive union shop agreements, the section did not mandate such agreements. Thus, the court failed to find governmental action to support a First Amendment claim. It held:

> When a private party makes the ultimate of choice within a range of options offered by the government, state action is generally not implicated. See *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65, 98 S.Ct. 1729, 1737-38, 56 L.Ed 2d 185 (1978). Since the union security clause was a product of private negotiations and was not attributable to the government, [the] constitutional challenges were properly dismissed for lack of government action. 795 F.2d at 1133.

Similarly, the PSC's charitable contributions policy permitting the utilities to recover a portion of their expenses in rates does not make a utility's private practices those of the government.

C. This Case Is of National Importance Because the New York State Court of Appeals Decision Creates a New Cause of Action Not Justified Under This Court's Precedents.

If allowed to stand, the Court of Appeals decision would support findings of state action in all forms of ratemaking, in effect creating a new cause of action for anyone complaining of a utility's spending policies. This result simply would not accord with this court's holding in *Jackson* that utilities are private entities, despite heavy state regulation.

For example, a utility expense routinely allowed in making rates is the cost and expense of terminating customers. If in allowing this expense state action occurs, then the holding of *Jackson* itself can be subverted. All a petitioner need claim is, not that the utility's decision to terminate service is state action, but that the funds the utility needs to terminate customers can only be obtained through state action. And once state action is found in that funding, a claimant may assert his full panoply of constitutional rights. This would of course include the right to due process that this court found inapplicable for lack of state action in *Jackson.*

Moreover, under the Court of Appeals decision, any item of utility spending could give rise to state action and any utility action could become state action if a regulatory agency could arguably prevent it, but chose not to do so. For example, a ratepayer could claim that a utility's rate recovery of the cost of an employee's health insurance plan that funds abortions infringes on his First Amendment rights because he opposes abortion. If the PSC's charitable contributions policy indeed represents state action, the potential for Constitutional claims based upon ratemaking is open-ended.

Thus, the Court of Appeals' decision essentially creates a new cause of action against utilities and state commissions based upon any aspect of utility activities someone might find unpalatable on constitutional grounds. The decision also circumvents the policy behind the state action doctrine, blurring the distinction between private and state activity. Surely, this Court's *Jackson* and *Blum* decisions preclude these results.

Conclusion

For the reasons set forth herein, petitioner prays that a writ of certiorari be issued to the New York State Court of Appeals.

Respectfully submitted,

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Dated: June 22, 1987

APPENDIX A

Order Denying Rehearing and Clarification

Court of Appeals

State of New York

In the Matter of JOSEPH CAHILL, Respondent, v PUBLIC SERVICE COMMISSION et al., Appellants, and CENTRAL HUDSON GAS AND ELECTRIC CORPORATION, Intervenor-Appellant.

Submitted February 9, 1987; decided March 24, 1987

Motions for reargument and for clarification denied. [*See*, 69 NY2d 265.]

APPENDIX B

Constitutional Provisions, Statutes and Regulations

United States Constitution

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof. is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the

United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.